

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Promoting the Availability of Diverse and	)	MB Docket No. 16-41
Independent Sources of Video Programming	)	

**COMMENTS OF  
ASPIRE CHANNEL, LLC AND UP ENTERTAINMENT, LLC**

Aspire Channel, LLC (“Aspire”) and UP Entertainment, LLC (“UP”) submit these comments to inform the Commission of the serious impediments to distributing independent programming services. Independent programmers face the combined impact of the bundling practices of major programmers and MFN provisions and ADM restrictions of major distributors with which the conglomerate programmers typically are not burdened. If the Commission remains committed to programming diversity and to an equal playing field between independent programmers and media conglomerates, Aspire and UP respectfully request that it act to address the competitive harms of these practices.

Aspire and UP are independent programmers. They are unaffiliated with any multichannel video programming distributor (“MVPD”) and are not part of a media conglomerate with leverage resulting from retransmission consent. Each targets underserved segments of American viewers and provides the very kind of diversity that the Commission has sought not simply to preserve but to promote:

The “ASPiRE” channel was launched in June 2012 and is dedicated to enlightening, entertaining, and promoting positive programming for African-American families. ASPiRE celebrates African-American achievement, and offers a diverse mix of programming, including movies, series and specials featuring music, comedy, drama, faith/inspiration, theatre/performing arts,

lifestyle and news/information. ASPiRE seeks to convey inspirational images, authentic stories, and achievable lifestyles to African-American viewers.<sup>1</sup>

“UP” provides uplifting and entertaining programming suitable for viewing by the entire family. Viewers identify it as a channel that they can trust to “watch with my family.”<sup>2</sup> UP programming includes original movies, series, and specials, as well as licensed family-friendly dramas and series. It seeks to present stories of faith, hope, and redemption with positive underlying messages.

At a time when approximately one-half of all shows appearing in prime time are rated as inappropriate for viewing by the entire family because of suggestive dialogue, coarse or crude language, sexual situations or violence,<sup>3</sup> the programming diversity offered by ASPiRE and UP is obvious.

***A. The Bundling Practices of Large Programmers Limit the Distribution of Independent Programming Services.***

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Aspire and UP depend heavily upon advertising revenues. Based upon their direct experience, a nationwide cable programmer must have at least 50 million subscribers to compete for the television advertising dollars of major corporate advertisers. Because it has become increasingly difficult to obtain carriage on MVPDs’ most highly-penetrated tiers, achieving this level of distribution requires wide-spread distribution, including distribution by all of the largest MVPDs.

Time and time again in its negotiations with small, mid-sized, and even larger MVPDs, Aspire and UP have been informed that their carriage opportunities are impeded by the bundling practices of well-established major distributors. As OPASTCO-NTCA informed the

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<sup>1</sup> Aspire is a certified minority business by the National Minority Supplier Diversity Council (NMSDC) through the Georgia Minority Supplier Diversity Council (GMSDC).

<sup>2</sup> UP Family TV Segmentation and Ad Transference Studies 2014: N=5000 and 1000; Internet Survey of P18-54 in CablePlus Homes.

<sup>3</sup> Review of programs rated “TV14 DSLV” or “TVMA” in TV Guide for January 2015.

Commission, “rural MVPDs have found that, in order to provide customers with access to the 10 most requested channels, they must pay for and distribute as many as 120 to 125 additional programming channels.” These small MVPDs have identified large programmer bundling practices as the “*most significant obstacle that they face*” in providing video service. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (Fifteenth Report)*, 28 FCC Rcd. 10496 (2013) (emphasis added) at ¶324. Notwithstanding plant improvements and advances in technology, many smaller MVPDs have limited channel capacity such that bundling simply precludes the carriage of independent programmers. The adverse impact of large programmer bundling practices was confirmed when a number of smaller and mid-sized MVPDs simply could not continue to carry Viacom’s bundled services when it renewed its affiliation agreement with the National Cable Television Cooperative (“NCTC”) in 2014. In connection with the deletion of the Viacom services, a number of MVPDs that are NCTC members immediately launched Aspire and UP.

As to larger distributors, UP’s first-hand experience with Cablevision Systems clearly demonstrates the competitive harm of bundling. As Cablevision explained in its 2013 lawsuit against Viacom, in order to obtain eight Viacom networks, which it wanted, including four that it needed,<sup>4</sup> Cablevision was required to carry 15 additional Viacom networks. Amended Complaint at ¶102. Otherwise, Cablevision would pay a “ten-figure penalty” to Viacom. *Id.* at ¶147. Consequently, the Viacom networks used up disproportionate amounts of

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<sup>4</sup> Cablevision alleged that it must offer BET, Comedy Central, MTV, and Nickelodeon or “face a significant loss of subscribers. *Cablevision Systems Corp. v. Viacom Int’l Inc.*, 13 Civ. 1278 (S.D.N.Y.) (“Amended Complaint”) at ¶40.

Cablevision's channel capacity<sup>5</sup> and programming budget. *Id.* at ¶¶33-34. If Cablevision had not been required to carry these lower-rated networks, it would have replaced them "with competing networks." *Id.* at ¶119.

There is no doubt that Viacom's bundling practices, as well as those of other major programmers, delayed Cablevision's launch of Aspire and UP which eventually occurred during the course of the Viacom litigation. Cablevision informed Aspire and UP on several occasions that such bundling was precluding their launch. Cablevision specifically confirmed in the Viacom litigation that it would have launched Aspire and UP "sooner if Viacom did not force Cablevision to distribute Viacom's Suite Networks." Amended Complaint at ¶159, 161.

The impact of the bundling practices of large programmers upon diversity is further exacerbated by the programming on the services that they distribute. Programming services that historically had offered programming suitable for family viewing are no longer a reliable source for family viewing. As the Parents Television Council dramatically demonstrated only a few months ago, brands of "conglomerate-owned cable networks" associated with family-friendly programming now include programming that is unfit for family viewing, particularly by children. *See* the annexed Exhibit A for the examples identified by the Parents Television Council.

***B. MFN and ADM Provisions Demanded by Large MVPDs from Independent Programmers Further Impede Their Distribution.***

The largest MVPDs typically insist upon stringent most favored nation ("MFN") and alternative distribution method ("ADM") provisions. The combination of these provisions, as a practical matter, severely limits or precludes the distribution of independent programming to

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<sup>5</sup> Even larger MVPDs such as Cablevision face channel capacity constraints for carrying video programming because they use an increasing amount of bandwidth for "other bandwidth intensive services" such as high speed Internet access. Amended Complaint at ¶33.

alternative media such as OTT distributors. If an independent programmer saddled with these provisions agrees to innovative carriage arrangements, it risks losing the carriage commitments of major MVPDs. Likewise, ADM provisions limit or preclude the distribution of independent programming over the Internet for extended periods. The types of MFN and ADM provisions that disadvantage independent programmers are summarized in the Comments of Altitude Sports Network, et al.

#### Conclusion

ASPiRE and UP offer programming diversity. Both ASPiRE and UP have a unique focus on programming suitable for families, and ASPiRE is the only minority-owned network serving African American family viewers. As the major programmers have moved away from both of these programming categories, their bundling practices and the contractual provisions of large distributors have severely limited the distribution of this diverse programming and have prevented or limited independent programmers from providing their programming to new outlets, such as OTT distributors. In order to preserve and hopefully to foster diversity, Aspire and UP respectfully request that the Commission take action to address the competitive imbalance faced by independent programmers.

Respectfully submitted,

ASPIRE CHANNEL, LLC



Eric Holoman  
Director

UP ENTERTAINMENT, LLC



Charles Humbard  
President and Chief Executive Officer

March 30, 2016

### **Loss of Programming for Family Quality Viewing from “Conglomerate-Owned Cable Networks”**

- The Discovery-owned TLC Network, once called The Learning Channel, airs primetime programs such as *Sex in Public*, *Sex Sent Me to the ER*, and *Buying Naked*. Each of these programs was rated as appropriate for viewing by children as young as fourteen.
- A&E, once called Arts & Entertainment, aired a program this past season called *Neighbors with Benefits*, the entire theme of which featured spouse-swapping. The program was rated as appropriate for viewing by children as young as fourteen.
- FYI, once called the Biography Network, aired a program this past season called *Seven Year Switch*, the entire theme of which featured spouse-swapping. The program was rated as appropriate for viewing by children as young as fourteen.
- CBS-controlled Pop, once called the TV Guide Channel, airs a program called *Schitt's Creek*. The program is rated as appropriate for viewing by children as young as fourteen.
- WE-tv, once known as Romance Classics, aired a program this past season called *Sex Box*, and featured couples having sexual intercourse on stage in an opaque, soundproof box and then emerging to discuss the encounter with a panel of “experts.” The program was rates as appropriate for viewing by children as young as fourteen.
- VH1, once known for playing popular music videos, airs a program called *Dating Naked*. The program features several couples meeting and dating in the nude, with explicit sexual dialogue and only the genital areas pixilated or blurred. The program is rated as appropriate for viewing by children as young as fourteen.
- AMC, once called American Movie Classics, has aired several seasons of *The Walking Dead*, which is one of the most graphically-violent programs in the history of television.
- Cartoon Network, which programs for children during parts of the day, shifts its programming to Adult Swim and its explicit animated programming at 9 pm Eastern Time. A child watching age-appropriate cartoons on Cartoon Network will suddenly be watching age-inappropriate content on Adult Swim with only the tick of a clock, rather than the pressing of a channel button on the TV remote control.
- Children’s programmer Nickelodeon aired a program called *Glenn Martin DDS*, featuring explicit content such as stripper pole-dancing. The program was rated as appropriate for viewing by children as young as fourteen.
- The FX Network has aired increasingly-pornographic material on this 21<sup>st</sup> Century Fox-owned expanded-basic cable network. Explicit violence and graphic sexual content airs routinely, including a recent scene with the “drill-bit dildo”. FX program *Archer* includes explicit animated content, and animated programming is inherently attractive to children. Matt Thompson, the creator of *Archer*, was recently quoted touting the

pornography on his show: “Us getting away with the amount of sex we got away with in that episode where Archer is having sex with Lana from behind, and Lana’s breasts are jiggling all over, was great...I thought, ‘Yeah! It’s cartoon porn! F\*\*k off! It’s great!’ I hope it’s cartoon porn. If you can get away with it, do it.”

- TV Land, which built an audience on 1960’s classic television programming, is set to air a program later this season called *Teachers*. The promotion for *Teachers* includes dialogue about “anal bleaching”.

Source: Comments of the Parents Television Council, filed in *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Cable television Service Applications*, MB Docket No. 15-149 (Nov. 2, 2015) at 4-5.